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No. 08-457

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

INTERNATIONAL SHIPPING AGENCY, INC.,
Petitioner,

v.

PUERTO RICO PORTS AUTHORITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

ANNE ELLISON MICKEY
Counsel of Record
JOHN WINSTON BUTLER
HEATHER M. SPRING
DONALD J. KASSILKE
SHER & BLACKWELL, LLP
1850 M Street, N.W.
Suite 900
Washington, DC 20036
(202) 463-2500

Counsel for the Petitioner

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REPLY BRIEF FOR PETITIONER

1. The Solicitor begins his argument with the truism that "[t]his court does not normally grant certiorari to review an appellate court's application of settled principles to the facts of a particular case." S.G. Opp. at 10. The argument does not apply here, because the petition's first question presented is one that this Court expressly reserved in *Regents of the University of California v. Doe*, 519 U.S. 425 (1997). The argument is further undermined by the Solicitor's necessary acknowledgement that "[t]his Court has not directly addressed the question whether an entity's status as an 'arm of the State' can 'change from one case to the next' (Pet. App. 8a) based on the nature of the function that gives rise to the suit." S.G. Opp. at 12. Petitioner does not, as the Solicitor suggests, argue that the court below considered the wrong factors Instead, petitioner argues in the context of its second question presented that the D.C. Circuit's improper adoption of a novel "all-or-nothing" approach to Eleventh Amendment analysis (the first question presented) directly caused its misapplication of those factors. In short, the Solicitor has not identified any "settled principle" that petitioner urges has been misapplied, and there is none.

PRPA makes a related argument – that reversal on the first question would not lead to a change in the outcome below. PRPA makes its version of the argument on a factual rather than a legal basis. Specifically, PRPA seeks to paint the dispute as one over a port redevelopment project – the "Golden Triangle" – that PRPA characterizes as having been run by the Governor. See PRPA Opp. at 5-6, 14. As the Solicitor correctly points out at page 6, footnote 1 of his opposition, however, the court below erred in

reciting PRPA's version of the facts. The Solicitor notes that: "The court referenced the redevelopment of San Juan's waterfront as 'the facts in this case,' Pet. App. 18a, but it does not appear from petitioner's complaint before the FMC that its claims arise out of the redevelopment project, see p. 4, *supra*."

2. The only real argument in opposition, made by both PRPA and the Solicitor, is that there is a possibility that the First Circuit may have changed its mind with respect to its position that an entity may be an arm of the state for some purposes but not others.

PRPA urges that "the First Circuit silently changed course." PRPA Opp. at 10. By its nature, PRPA's "silent change" argument admits that it has no affirmative basis. Accordingly, there is little to which petitioner can reply. PRPA cites four cases, see PRPA Opp. at 10-11, in which it claims that the First Circuit's failure to enunciate a function-specific analysis proves that it has abandoned that approach. The simple answer is that the entities involved in those cases were not created under statutory provisions that authorized those entities to undertake multiple and distinguishable functions. The statutes governing the PRPA, in contrast, do so provide, and it is that difference that accounts for the function-specific analysis in *Puerto Rico Ports Authority v. M/V Manhattan Prince*, 897 F.2d 1 (CA1 1990), and *Royal Caribbean Corp. v. Puerto Rico Ports Authority*, 973 F.2d 8 (CA1 1992), and that likewise accounts for the lack of any such analysis in the cases cited by PRPA. The absence of a multi-function analysis in the cited cases is no more telling than the fact of a mechanic not discussing brake repair with a customer who complains of a heater malfunction, even

though that mechanic has often dealt with brake repairs in the past. Sometimes silence can be read to mean something; here it cannot.

The Solicitor is a bit more cautious, passing on PRPA's facially suspect "silence" argument and urging instead that "[b]ecause the First Circuit has not considered PRPA's status in light of this Court's most recent Eleventh Amendment decisions, it is unclear whether any square circuit conflict currently exists on the question whether PRPA is immune from the FMC adjudication at issue in this case." S.G. Opp. at 12. This argument fails for two reasons.

First, the Solicitor offers no explanation of what it is about "this Court's most recent Eleventh Amendment decisions" that might cause the First Circuit to change its mind. If there were in fact something specific, or even general, in this Court's recent decisions that would suggest that the First Circuit might change its mind, petitioner would expect the Solicitor to say what it is. He has not, and as such the argument amounts to nothing more than idle speculation that the First Circuit might change position. Under that theory, circuit splits would become rare indeed.

Second, the First Circuit in 2004 (after which there have been no Eleventh Amendment cases from this Court that have been cited by the Solicitor or PRPA) decided *Camacho v. Puerto Rico Ports Authority*, 369 F.3d 570 (CA1 2004), an age discrimination case. In *Camacho*, the First Circuit cited both *Manhattan Prince* and *Royal Caribbean* in discussing the functions delegated to PRPA by the legislature. The discussion highlights the fact that the First Circuit reached different conclusions in those two cases based on the PRPA functions involved in each:

> This holding is in line with our prior precedents. We previously ruled, in a negligence case, that the Authority could not be held liable for a pilot's carelessness on a respondeat superior theory. *See P.R. Ports Auth. v. M/V Manhattan Prince*, 897 F.2d 1, 12 (1st Cir. 1990). Implicit in this holding is the determination that, as a licensing and regulatory body, the Authority does not exercise the type of control over harbor pilots that would be needed to qualify it as their employer under common law agency principles. *See id.* (observing that the Authority's "functions are related to licensing and the competency of pilots" and that it "acts like a public service commission, setting and enforcing the standards within the industry") (citation and internal quotation marks omitted); *see also Royal Caribbean Corp. v. P.R. Ports Auth.*, 973 F.2d 8, 12 (1st Cir. 1992) (distinguishing the Authority's regulatory role in overseeing pilot services from its proprietary role in maintaining pier areas).

Id. at 578.

The Solicitor might quibble that *Camacho* is not an Eleventh Amendment case, but that would both miss the point and also fail to explain why the Solicitor did not address the case. The significance of the case here is simply that its existence provides a recent and strong indication from the First Circuit that it has not in fact changed its mind about the function-specific approach that it enunciated in *Manhattan Prince* and *Royal Caribbean*. Instead, that court in *Camacho* went out of its way to reaffirm both those holdings *and* the reason why the two cases yielded different outcomes. That restatement of the function-

specific approach cannot be squared with the uncertainty that respondents seek to conjure from thin air.

The First Circuit and the D.C. Circuit are in square conflict on the issue of whether an entity may be an "arm of the state" for some purposes but not for others. The question is one that must be addressed as a threshold matter in any case involving an entity that a state has by statute clothed with multiple, distinct functions. Unless this Court resolves the conflict now, the split and the D.C. Circuit's novel approach will lead to confusion and conflict in the lower courts. The issue is important and ripe, and this Court should review it now.

Respectfully submitted,

ANNE ELLISON MICKEY
Counsel of Record
JOHN WINSTON BUTLER
HEATHER M. SPRING
DONALD J. KASSILKE
SHER & BLACKWELL, LLP
1850 M Street, N.W.
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